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In the
Supreme Court of the United States

OCTOBER TERM, 1972

No.

NEWELL HAMMOND,

PETITIONER,

v.

UNITED PAPERMAKERS AND PAPERWORKERS UNION, A.F.L.-C.I.O., UNITED PAPERMAKERS AND PAPERWORKERS, LOCAL NO. 985, and WATERVLIET PAPER COMPANY, DIVISION OF HAMMERMILL PAPER COMPANY,

RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Petitioner NEWELL HAMMOND respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on June 14, 1972.

Opinions Below

The bench opinion of the District Court granting Respondents' motions to dismiss is reproduced in Appendix C hereto, p. 24. The opinion of the Court of Appeals affirming the judgment of the District Court is reproduced in Appendix A hereto, p. 20.

Jurisdiction

The judgment of the Court of Appeals was entered on June 14, 1972. This Court has jurisdiction to review this judgment under 28 USC §1254(1).

Question Presented

Did the Respondents' violate the Petitioner's right to free exercise of religion and other rights guaranteed him under the First, Fifth, and Ninth Amendments to the Constitution by discharging him pursuant to the union shop clause contained in the Collective Bargaining Agreement when the Petitioner's religious convictions and the tenets of his church forbid him from paying dues and fees to the Union.

Constitutional Provisions and Statutes Involved

UNITED STATES CONSTITUTION

First Amendment

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or of the right of the people peaceably to assemble, and to petition the Government for a redress of grievance.

Fifth Amendment

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces,

or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, of property, without due process of law; nor shall private property be taken for public use, without just compensation.

Ninth Amendment

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

NATIONAL LABOR RELATIONS ACT, §7, 29 USC §157, 61 Stat. 140

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

NATIONAL LABOR RELATIONS ACT, §8(a)(3),
29 USC §158(a)(3),
61 Stat. 140-141, 65 Stat. 601, 73 Stat. 525

SEC. 8. (a) It shall be an unfair labor practice for an employer—

* * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor

organization: *Provided*, That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8(a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9(a), in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 9(e) within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: *Provided further*, That no employer shall justify any discrimination against an employee for non-membership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

* * *

NATIONAL LABOR RELATIONS ACT, §14(b),
29 USC §164(b), 61 Stat. 151

SEC. 14(b). Nothing in this Act shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employ-

ment in any State or Territory in which such execution or application is prohibited by State or Territorial law.

Statement Under Rule 33(2)(b)

Since this proceeding may draw into question the constitutionality of §§7 and 8(a)(3) of the National Labor Relations Act, an act of Congress affecting the public interest, as applied to the petitioner in the circumstances of this case, and neither the United States nor any agency, officer or employee thereof is a party, it is noted that 28 USC §2403 may be applicable.

Neither the District Court nor the Sixth Circuit Court of Appeals entered a certification to the Attorney General under the provisions of 28 USC §2403.

Statement of the Case

The petitioner brought this action in the United States District Court for the Western District of Michigan, Southern Division, on June 17, 1970. Jurisdiction of the District Court was invoked under 28 USC §1331(a) and 1343 and 42 USC §1988, the question presented arising under the Constitution and laws of the United States and the amount in controversy exceeding Ten Thousand Dollars.

The Complaint contains the following pertinent allegations which must be taken as true.

On July 20, 1967, the Respondents entered into a collective bargaining agreement, embracing wages, hours, and other terms and conditions of employment for employees of the Company (Appendix E, p. 29). Pursuant to the provisions of the National Labor Relations Act, as amended, and in particular, Section 8(a)(3) thereof, the collective bargaining agreement included a union shop clause, which conditioned employment with the Respondent Company on union membership and the payment of an initiation fee and union's dues. (Appendix E p. 29)

On July 20, 1967, the date of the signing of the Agreement, the Petitioner had been in the employ of the Company for approximately Eleven (11) years and was then employed in the production department. (Appendix E, p.)

The petitioner is a member of the Seventh Day Adventist Church. (Appendix E, p. 29) One of the major tenets of the Church is that a member cannot surrender his right to make decisions nor financially support any organization which may act contrary to his conscientious religious convictions. (Appendix E, p. 30). The Petitioner informed the Respondents that as a member of the Seventh Day Adventist Church, he entertained and practiced the sincere religious and conscientious conviction and belief that the payment of fees and dues to a labor union violated his freedom of choice to deal justly and impartially with all men, for use of which freedom he is accountable to God. Accordingly, he informed the Respondents that he could not join the Union as required by Section 3.2 and 3.4 of the collective bargaining agreement, but to show his good faith, he offered to and did make periodic contributions to the American Red Cross in amounts equal to the Union dues that would have otherwise been payable by him as a Union member. (Appendix E, p. 30)

Notwithstanding the Petitioner's religious convictions and his efforts to explain them to the Respondents, the Union demanded that the Company terminate his employment. (Appendix E, p. 31) The Petitioner was then discharged on or about August 28, 1967, for the sole and stated reason that he had refused to join or pay dues to the local union as provided in Section 3.4 of the collective bargaining agreement. (Appendix E, p. 31)

Following his discharge, the Petitioner made extended and continued effort to obtain new employment at a salary comparable with that being paid by the Respondent Company but to no avail. (Appendix E, p. 31)

The Complaint also alleges that applied with the sanction

of the National Labor Relations Act the collective bargaining agreement, in particular the union shop clause, as applied to the Petitioner, violates his rights of free exercise of religion by conditioning his right to work upon surrender of his right to practice his religious beliefs and violates other rights he has under the First, Fifth, and Ninth Amendments to the Constitution.

Both Respondents moved to dismiss the Complaint for failure to state a claim upon which relief may be granted. These motions were granted by the District Court, and a judgment was entered dismissing the Complaint.

The Court of Appeals affirmed this judgment.

Reasons for Granting the Writ

I. THIS CASE RAISES AN IMPORTANT QUESTION OF CONSTITUTIONAL LAW WHICH HAS NOT PREVIOUSLY BEEN DECIDED BY THIS COURT, NAMELY WHETHER THE CONSTITUTION PROTECTS THE RIGHT OF AN INDIVIDUAL EMPLOYEE TO REFUSE TO PAY DUES OR FEES TO A LABOR UNION BASED UPON HIS RELIGIOUS BELIEF, CONSCIENCE, AND THE TEACHING OF HIS CHURCH.

This case represents the fifth time that this question has been raised in a United States Court of Appeals. It arose first in behalf of the Plymouth Brethren in *Otten* v. *Baltimore & O. R. Co.*, 205 F.2d 58, final judgment affirmed sub nom. *Otten* v. *Staten Island Rapid Transit Railway Co.*, 229 F.2d 919, (CA 2), cert. den. 351 U.S. 983 and *Wicks* v. *Southern Pacific Co.*, 231 F.2d 130 (CA 9), cert. den. 351 U.S. 946. The same issues were raised in behalf of Seventh-day Adventists in *Gray* v. *Gulf, Mobile & Ohio Railroad Company*, 429 F.2d 1064 (CA 5), cert. den. 400 U.S. 1001, and *Linscott* v. *Millers Falls Co.*, 440 F.2d 14 (CA 1), cert. den. 404 U.S. 872.[1]

[1] Mr. Chief Justice Berger and Mr. Justice Douglas dissenting in both cases.

A related issue involving freedom of association based on conscientious objection to joining a union was raised in *Russell* v. *Catherwood*, 33 App. Div. 2d 592, 304 N.Y.S. 2d 415, cert. den. 399 U.S. 936.[2]

The court of Appeals for the Fifth Circuit in deciding the *Gray* case squarely held that *Railway Employes' Dept.* v. *Hanson*, 351 U.S. 225, was dispositive of the issue involved in that case, 429 F.2d at 1068.

The Court of Appeals for the First Circuit in *Linscott* also implied that *Hanson* was determinative, saying: "*Hanson's* balancing, and thus its conclusion, should be the same in the case before us, since the government's interest, and the Plaintiff's burden (loss of a union-shop employer) are the same." 440 F.2d at 17. Following the *Gray* and *Linscott* decisions, the Court of Appeals for the Sixth Circuit below also holds that *Hanson* is controlling (Appendix A, p. 21).

The *Hanson* case involved a general allegation by nine employees of the Union Pacific Railroad Company that the union-shop provision of the Railway Labor Act was unconstitutional. Although the Supreme Court upheld the general validity of Section 2, Eleventh of the Railway Labor Act (the analogous provision of Section 8(a)(3) of the National Labor Relations Act), the court was careful to point out that the holding was a narrow one:

> "*Wide-ranged* (non-particularized) problems are tendered under the First Amendment." 351 U.S. at 236 (emphasis added)
>
> ". . . It is argued that compulsory membership will be used to impair freedom of expression. *But that problem is not presented by this record.*" 351 U.S. at 238 (emphasis added)
>
> ". . . If other conditions are in fact imposed, or if the exaction of dues, initiation fees, or assessements is used

[2]See dissenting opinion of Mr. Chief Justice Berger with whom Mr. Justice Douglas joined.

as a cover for forcing ideological conformity *or other action in contravention of the First Amendment, this judgment will not prejudice the decision in that case.* For we pass narrowly on No. 2, Eleventh of the Railway Labor Act." 351 U.S. at 238 (emphasis added)

"... The Court has put to one side situations not now before us for which the protection of the First Amendment was earnestly urged at the bar. I, too, leave them to one side." 351 U.S. at 242 (Frankfurter, J. concurring)

No particularized, concrete constitutional claim was presented in *Hanson* and the Court expressly refused to decide an issue which was not properly before it.

"The First Amendment questions not reached in *Hanson* again confronted the Court (and were avoided by a process of statutory interpretation) in *International Ass'n of Machinists* v. *Street*, 367 U.S. 740 (1961) R. Smith, L. Merrifield and T. St. Antoine, *Labor Relations Law*, 1028 (1968).

In the case of *International Assn; of Machinists* v. *Street*, 367 U.S. 740 (1961) the court acknowledged the basis on which the *Hanson* decision was rendered:

"We held in *(Hanson)* that enactment of the provision #2, Eleventh authorizing union shop agreements between interstate railroads and unions of their employees was a valid exercise by Congress of its powers under the Commerce Clause and did not violate the First Amendment or the Due Process Clause of the Fifth Amendment. It is argued that our disposition of the First Amendment claims in *Hanson* disposes of Appellees' constitutional claim in this case adversely to their contentions. We disagree. As appears from its history, that case decided only that #2, Eleventh, in authorizing collective agreements conditioning employees' continued employment on payment of union dues, initiation fees and assessments, *did not on its*

face infringe upon protected rights of association." 367 U.S. at 746-747. (emphasis added)

Speaking further concerning the limited ruling in *Hanson*, the Court said:

"... it becomes obvious that this Court passed merely on the constitutional validity of §2, Eleventh of the Railway Labor Act *on its face, and not as applied to infringe the particularized constitutional rights of any individual.*" 367 U.S. 748.

"... we therefore reserved decision of the constitutional questions which the Appellees present in this case." 367 U.S. at 748.

"... Thus, all that was held in *Hanson* was that §2, Eleventh was constitutional in its *bare authorization* of union shop contracts requiring workers to give 'financial support' to unions legally authorized to act as their collective bargaining agents. We sustained this requirement—and only this requirement—embodied in the statutory authorization of agreements under which 'all employees shall become members of the labor organization representing their craft or class.' *Clearly, we passed neither upon forced association in any other aspect* nor upon the issue of the use of exacted money for political causes which were opposed by the employees." 367 U.S. at 749[3]

Despite this Court's limited holding in *Hanson*, the Sixth Circuit below held that the decision disposed of the Petitioner's particularized First Amendment claim. This was error by the Court because, as shown above, *Hanson* did not invoke a particular First Amendment claim nor was the test that is historically invoked in particularized First Amendment cases even mentioned in the case.[4]

[3]In *Street*, the Court avoided the constitutional question presented by construing Section 2 of the Railway Labor Act to prohibit a union's use of dues for political purposes after protest by the individual.

[4]The stringent test found in *Sherbert v. Verner*, 374 U.S. 398, (1963) was specifically taken from a series of cases originating long before the *Hanson* decision. See specifically 374 U.S. at 403-409.

The Court did not require a showing that the governmental interest was "paramount"[5] or that any infringement on First Amendment Rights was "necessary".[6] And, just as significantly, the Court did not examine the alleged injury to the Plaintiffs or balance the governmental interest against the injury. Even a cursory examination of the *Hanson* decision reveals that the due process constitutional test was invoked, not the test which is invoked where a particularized Firest Amendment infringement is alleged.

The Petitioner respectfully submits that if Certiorai is denied in this case, it will overrule this Court's pronouncement:

> "if dues, initiation fees, or assessments is used as a cover for forcing ideological conformity or *other action in contravention of the First Amendment*".

the decision in *Hanson*

> *"will not prejudice the decision in that case." Hanson,* 351 U.S. at 238

II. THE OPINION OF THE COURT OF APPEALS IN THIS CASE CONFLICTS IN PRINCIPLE WITH THE DECISION OF THIS COURT IN *Sherbert* v. *Verner*, 374 U.S. 398, OTHER DECISIONS FOLLOWING THAT CASE, AND *Wisconsin* v. *Yoder*, U.S. , OPINION NO. 70-110

The question presented in this case is when may conduct dictated by a religious conviction be regulated by the State or Congress, or private persons, with the sanction of the State or Congress? The Petitioner submits that this question was authoritatively determined by this Court in *Sherbert* v. *Verner* not *Hanson*.

In *Sherbert*, a member of the Seventh Day Adventist Church was discharged because she would not work on Saturday, the

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[5] *Thomas v. Collins*, 323 U.S. 516, 530 (1944), and cases cited therein.

[6] *Schneider v. State*, 308 U.S. 147, 161, (1939); *Martin v. Struthers*, 319 U.S. 141, 144-149, (1943).

Sabbath Day of her faith. Sherbert filed a claim for unemployment compensation benefits under a state statute which provided that a claimant was ineligible for benefits if she had failed, without good cause, to accept available suitable work when offered her. The Court held that to disqualify Sherbert solely on the ground that she had refused Saturday work, when the acceptance of such work would have been contrary to her religious beliefs, was to impose an unconstitutional burden on the free exercise of her religion. In so holding, the Court announced a several-fold test for balancing the competing interests:

(A) Is there a burden imposed on the exercise of religion?

"If . . . the decision of the (court below) is to withstand Appellant's constitutional challenge, it must be either because her disqualification as a beneficiary represents no infringement by the State of her constitutional rights of free exercise . . ." 374 U.S. at 403.

(B) If there is such a burden, is the infringement justified by a compelling governmental interest?

"We must . . . consider whether some compelling (governmental interest . . . justifies the substantial infringement of Appellant's First Amendment right." 374 U.S. at 406.

1. Is the governmental interest substantial?

". . . only the gravest abuses, endangering paramount interests, give occasion for permissable limitation. . ." 374 U.S. at 405 (citation omitted)

2. Is this the sole method by which the government may attain its goal?

". . . it would plainly be incumbent upon the (government) to demonstrate that no alternative forms of regulation would combat such abuses without infringing First Amendment Rights." 374 U.S. at 407 (footnote omitted)

(C) Would an exemption for those with religious scruples *in fact* impair the governmental interest?

"The Appellees suggest no more than a *possibility* (that the government's interest would be impaired)." 374 U.S. at 407. (emphasis added)

The test announced in *Sherbert* has been restated and applied in several recent cases:

"But the burden rests upon the Government to demonstrate the compelling interest requiring the restriction of free expression and to show that the regulation serves that interest with the least restriction possible on the citizen's ability to communicate his political dissent." *Women Strike For Peace* v. *Hickel*, 420 F.2d 597, at 605, (D.C. Cir. 1969)

"... Where governmental activity impairs individual ability to abide religious beliefs, two demonstrations become essential to its validity. (A showing of a compelling governmental interest and) an equally convincing showing that 'no alternative forms of regulation would combat such abuses without infringing First Amendment Rights'." *Barnett* v. *Rodgers*, 410 F.2d 995, at 1000, (D.C. Cir. 1969)

"The Court in *Sherbert* thus utilized a two-fold analysis which calls for a determination of, first, whether the application of the statute imposes any burden on religion, and second, if it does, whether some compelling state interest justifies the infringement." *People* v. *Woody*, 61 Cal. 2d 716, 719, 40 Cal. Rptr. 69 (1964)

"... even if a compelling state interest were shown, the burden remains on the state (to show no alternative is available)." *Heilberg* v. *Fixa*, 236 Fed. Supp. 405, 408. (N.D., Cal., S.D. 1964) Cf. *Kovach* v. *Maddux*, 238, F. Supp. 835, 844, (MD Tenn. 1965)

And in dicta this Court recently reaffirmed the validity of the *Sherbert* test:

"... as to neutral prohibitory or regulatory laws having secular aims, the Free Exercise Clause may condemn

certain applications clashing with imperatives of religion and conscience, when the burden of First Amendment values is not justifiable in terms of the Government's valid aims." (citing *Sherbert*) *Gillette v. U.S.*, 91 S.Ct. 828, 842, (1971)

This specific meaning of "compelling state interest" also becomes clear from other cases following *Sherbert*. In *In re Jenison*, 375 U.S. 14, this court vacated the judgment of the Supreme Court of Minnesota, upholding a contempt conviction of a woman who refused on religious grounds to serve as a juror, and directed the Supreme Court of Minnesota to consider the case further in the light of *Sherbert v. Verner*. Upon reconsideration, *In re Jenison*, 267 Minn. 136, the Minnesota court held that there was an inadequate showing that the state's interest in obtaining competent jurors required the court to override the claim of free exercise of religion. This case did not hold that there was no compelling state interest in obtaining service of jurors, but rather that there was no such interest in compelling 100% enforcement of such a requirement against a religious objector.

One of the most significant recent cases dealing with the compelling interest test is this Court's decision in *State v. Yoder*, U.S. (1972) just handed down in May of this year.[7] In this case the Supreme Court of Wisconsin upheld the right of Amish parents to remove teenage children from the public schools and held unconstitutional, as applied to members of the Amish religion who have graduated from the eighth grade, the provisions of the compulsory education law. The court did not hold that there was no compelling interest in requiring education for children between seven and sixteen years, but rather the interest in applying the requirement universally in the face of the free exercise claim was not substantial enough. The court says, 49 Wis. 2d at 438, 182 N.W.2d at 542: "A compelling interest is not just a general interest

[7]No. 70-110 (May 15, 1972).

in the subject matter but the need to apply the regulation without exception to attain the purposes and objectives of the legislation." The court goes on to hold on the authority of *Sherbert* v. *Verner* and *In re Jenison* that an exemption for the Amish would not defeat the purpose of compulsory education. In affirming the judgment of the Supreme Court of Wisconsin, and citing *Sherbert*, this Court held that there must be a state interest of sufficient magnitude to override the interest claiming protection under the Free Exercise Clause.

> "The essence of all that has been said and written on the subject is that only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion." *Yoder* at 9.

Despite the fact that in this case it was strenuously pointed out to the District Court that the *Sherbert* tests applied, the Court nevertheless granted the Respondents' motions to dismiss. No proof was taken nor were affidavits introduced into evidence. The District Court's sole reasoning was stated to be that because citizens must pay governmental taxes, the Petitioner must pay the Union. (Appendix C, p. 25). The Sixth Circuit's sole reason was that *Hanson* controlled. Neither the District Court nor the Court of Appeals ever considered the application of the *Sherbert* tests. Indeed, a court can't apply the *Sherbert* tests on a motion to dismiss because unattested assertions won't satisfy the requirements of the case.[8] However, even assuming that the court could apply *Sherbert* on a motion to dismiss, in this case there was absolutely no showing that the burden on the Petitioner's religion was justified by some compelling Federal interest, that the burden was the sole method by which the government could attain its goal, and that an exception to the Petitioner because of his religious convictions would impair the governmental interest. On the other side of the coin, because the Court of Appeals below affirmed the District's Court's order granting the motions to

[8] *Sherbert* at 407.

dismiss for failure to state a claim upon which relief may be granted, it must be accepted as true, as set forth in the complaint, that a tenet of the Seventh Day Adventist Church prohibited the Petitioner from paying compulsory union dues and that he personally held a deep conviction to the tenet. Thus, like in *Sherbert* and in *Yoder*, the Court is dealing here with a "cardinal principle" of religious faith. The Petitioner was faced with the same unmistakable compulsion that the Court found objectionable in *Sherbert*. He was forced to choose between adhering to his religious belief or surrendering an eleven year employment relationship. As a dedicated member of the Seventh Day Adventist Church, he had no choice but to refuse to pay the union dues. The burden placed on Petitioner's exercise of religion by the enforcement of the union shop clause is unmistakably clear.

Furthermore, the burden inflicted in this case results in even more substantial harm than the harm inflicted in *Sherbert*. In *Sherbert*, the individual forfeited twenty-two weeks of Unemployment Compensation. In the instant case, the Petitioner has forfeited thousands of dollars and the injury is one of continuing duration. Even today, the Petitioner has been unable to obtain employment at a similar salary without sacrificing his religious convictions.

The Petitioner respectfully submits that there is an irreconcilable conflict between the opinion below and the decisions and teachings of this Court, and other courts, that an infringement upon a particularized First Amendment freedom requires a showing of a *paramount* governmental interest which is *necessary* with *no alternative* available. It is not enough to show that union shop is legitimate, *not paramount*, and is allowable, *not necessary*.

III. THE *SHERBERT* TESTS CAN NOT BE APPLIED ON A MOTION TO DISMISS.

The Sixth Circuit's opinion below does not state the reasons for its decision except to cite *Hanson* as controlling. As shown

previously, this was erroneous. Both the *Sherbert* and *Yoder* decisions require a *showing* that the infringment on religion is necessary to protect a paramount governmental interest. The unattested assertions by counsel that a religious exemption would create disruptions to interstate commerce, or have disruptive effects among other employees who pay their dues, is not sufficient. The courts are prohibited from taking judicial notice of these unattested facts as well as the validity of the free rider argument. The only proper areas for judicial notice are facts which are capable of certain verification as well as matters of common knowledge. McCormick, *Evidence*, §§324, 325 (1954). Wigmore, including these two classifications, adds an additional classification to the list of facts which may be judiciously noticed.

> "(1) matters which are actually so notorious to all that the production of evidence would be unnecessary; (2) matters which the judicial function supposes the judge to be acquainted with; (3) matters . . . capable of such instant and unquestionable demonstrations, if desired, that no party would think of imposing a falsity on the tribunal in the face of an intelligent adversary." 9 Wigmore, *Evidence* §2571 (3rd ed. 1940).

The Petitioner respectfully submits that possible disruptions to interstate commerce, the free rider doctrine, disruptive effects among other employees who pay their dues, and the promotion of stable collective bargaining, are all subjects beyond the realm of judicial notice either under Wigmore or McCormick's views. However, Wigmore goes on to say that if a matter is taken as true without requiring a party to offer evidence on the question, the opposing party should not be prevented from disputing the matter by additional evidence. 9 Wigmore, *Evidence*, §2567 (3rd ed. 1940).

Adopting Wigmore's view, the United States Supreme Court has stated that the subject matter of judicial notice is disput-

able. *Ohio Bell Tel. v. Public Util. Comm'n.*, 301 U.S. 292, 57 L. Ed. 1093, 57 S.Ct. 724 (1937). The court states at 301 that:

> ". . . notice, even when taken, has no other effect than to relieve one of the parties to a controversy of the burden of resorting to the usual forms of evidence."

The Petitioner respectfully submits that he was denied due process of law when the District Court took judicial notice of questionable facts and then denied him the right to a hearing in order to dispute those facts.

Conclusion

The question raised in this case is vital to the livelihoods of Americans belonging to a variety of religious sects, and in particular Seventh-day Adventists, who are taught that the payment of fees and dues to a labor union requires the surrender of the member's obligation to deal justly and equally with all men to which he is accountable to God. This is not the case where an individual employee is required by a union and company to abandon a personal secular belief but rather the employee is required to abandon a deeply held religious conviction and tenet of his church if he wishes to pursue his right to earn a livelihood.

In Michigan, as well as numerous other highly industrialized states, the union shop clause is common and prevalent. In fact, in Michigan union security provisions requiring the payment of union dues or agency fees is sanctioned by state law in both private industry and public employment. Accordingly, no longer does the Seventh-day Adventist have the mobility to seek employment in that sector of our economy which is excluded from the coverage of the National Labor Relations Act. In short, the time is here when a Seventh-day Adventist in Michigan must abandon his religious convictions and the tenet of the church if he wishes employment or move from

the state in a search to secure a livelihood in other localities of the country which do not sanction or allow union security provisions in every sector of the economy.

As stated in *Yoder*, it is not sufficient to say that the Petitioner may relocate in some more tolerant state or country for *"forced migration of religious minorities was an evil which lay at the heart of the religious clauses"*, *Yoder*, at p. 13, footnote 9.

For the foregoing reasons, this Petition For A Writ of Certiorari should be granted.

Respectfully submitted,

LEE BOOTHBY
THOMAS H. SCHWARZE
Attorneys for Petitioner

Dated: September 6, 1972

APPENDIX A

United States Court of Appeals
For the Sixth Circuit

No. 71-1836

NEWELL HAMMOND,
Plaintiff-Appellant,

v.

UNITED PAPERMAKERS AND PAPERWORKERS UNION, AFL-CIO,
and
UNITED PAPERMAKERS AND PAPERWORKERS LOCAL No. 985,
and
WATERVLIET PAPER COMPANY, DIVISION OF HAMMERMILL PAPER COMPANY,
Defendants-Appellees.

APPEAL from the United States District Court for the Western District of Michigan.

Decided and Filed June 14, 1972.

Before: EDWARDS, PECK and MCCREE, Circuit Judges.

PER CURIAM. Plaintiff-appellant Hammond appeals from a summary judgment entered in the United States District Court for the Western District of Michigan dismissing his complaint as a matter of law.

Hammond worked for the Watervliet Paper Company, which the Papermakers Union organized and from which it subsequently secured a union shop agreement. With all due notice and warning as to the provisions of the union shop agreement, Hammond declined to join the union because
2 *Hammond* v. *United Papermakers, etc., et al.* No. 71-1836
of his Seventh Day Adventist beliefs. He also declined (and does now) to pay the equivalent of the union dues, whether he joined the union or not, on the ground that it would represent "striving" in violation of his religious faith to support in any way any organization like the union.

He was thereupon discharged and several years later filed a suit for damages for his claimed wrongful discharge against both the union and the company.

It is clear, of course, that Congress has authorized union shop clauses (such as that under consideration here) as permissible, contractual provisions in a collective bargaining agreement between a union and a management. *See* 29 U.S.C. §158(a)(3) (1970), §8(a)(3) of the National Labor Relations Act. Such legislation has been upheld by the United States Supreme Court in *Railway Employees Department* v. *Hanson*, 351 U.S. 225 (1956).

Since appellant's discharge occurred before the enactment of the Equal Employment Opportunity Act, 42 U.S.C. §2000e, *et seq.*, (1970), his reliance must be upon the terms of the First Amendment. In this regard the basic holding of *Hanson* becomes significant:

> We only hold that the requirement for financial support of the collective-bargaining agency by all who receive the benefits of its work is within the power of Congress under the Commerce Clause and does not violate either the First or the Fifth Amendments. *Railway Employees Department* v. *Hanson, supra* at 238.

The specific issue involved here pertaining to discharge of a Seventh Day Adventist for failure to join or pay the equiva-

lent of dues to a union has been decided adversely to appellant by the First Circuit in *Linscott* v. *Millers Falls Co.*, 440 F.2d 14 (1st Cir.), *cert. denied*, 404 U.S. 872 (1971), and by the Fifth Circuit in *Gray* v. *Gulf, Mobile & Ohio R.R. Co.*, 429 F.2d 1064 (5th Cir. 1970), *cert. denied*, 400 U.S. 1001 (1971).

No. 71-1886 *Hammond* v. *United Papermakers, etc., et al.* 3

The District Judge who granted summary judgment gave sympathetic attention to appellant's complaint, but obviously felt constrained by decided law to rule against him.

For the reasons set forth above and further stated in the District Judge's opinion from the bench, we affirm the judgment of the District Court.

APPENDIX "B"

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
No. 71-1886

NEWELL HAMMOND,
PLAINTIFF-APPELLANT,
VS.
UNITED PAPERMAKERS AND PAPERWORKERS UNION, AFL-CIO, AND UNITED PAPERMAKERS AND PAPERWORKERS LOCAL NO. 985, AND WATERVLIET PAPER COMPANY, DIVISION OF HAMMERMILL PAPER COMPANY,
Defendants-Appellees.

Before: EDWARDS, PECK and MCCREE, Circuit Judges.

JUDGMENT

APPEAL from the United States District Court for the Western District of Michigan.

THIS CAUSE came on to be heard on the record from the United States District Court for the Western District of Michigan, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause by and the same is hereby affirmed.

It is further ordered that Defendants-Appellees recover from Plaintiff-Appellant the costs on appeal, as itemized below, and that execution therefor issue out of said District Court.

Entered by order of the Court.

James A. Higgins, *Clerk*

A True Copy.

Attest:

Clerk

APPENDIX "C"

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN

NEWELL HAMMOND,

PLAINTIFF,

VS.

UNITED PAPERMAKERS AND PAPERWORKERS UNION, AFL-CIO AND UNITED PAPERMAKERS AND PAPERWORKERS LOCAL NO. 985 AND WATERVLIET PAPER COMPANY, DIVISION OF HAMMERMILL PAPER COMPANY,

Civil Action No. 246

DEFENDENTS.

BENCH OPINION

THE COURT: The Court has carefully considered this case. All of the positions of the plaintiff factually are taken as true and proved.

The First Circuit Court in Linscott versus Millers Falls case does apply with particularity and deliberate consideration with the Sherbert test to the facts that were taken as true in the Linscott case when it went before the Circuit Court on defendants' motion to dismiss. Thrust is that the ultimate objective of a congressionally approved union security is to provide a means of support of an industry participating in interstate commerce, maintains a representation of all the employees in the certified plant. Certified namely by the bargaining agent

for the plant, it would tax the cost of maintaining that agency hopefully distributed among all of those who were participants in the benefits.

The tax is to be paid to the agent for the agent's benefit and to no one else. One cannot avoid income tax, state, local or national by agreeing to pay the same to a charitable organization of either the government's choice or of its own choice. Taxes do not work that way. These are not the ways of Caesar. Taxes are supposed to apply to all who share the benefits of the government agency that the taxes support.

The same principle has been approved as a neams of support for certified bargaining agents in the collective bargaining scheme of management labor relations which is developing its own type of common law as well.

The Linscott versus Millers Falls, those in the district and in the first circuit are controls of this case. They are supported by the Gray case, Gray versus Gulf, Mobile and Ohio Railroad as well as Hanson and Sweet. Dewey is also a supporting case.

This issue has been well and fairly litigated in other jurisdictions and the progress has been clear and certain to the ultimate judgments which have been enumerated by the Court.

For the reasons stated, defendants United Papermakers and Paperworkers Union, AFL-CIO and United Papermakers and Paperworkers Local No. 985 and Watervliet Paper Company, Division of Hammermill Paper Company motions to dismiss are hereby granted.

And an order may be entered accordingly, and I must confess my sincere sympathy and empathy with the plaintiff's position.

MR. SCHWARZE: Your Honor, may I ask a point of clarification for the record? The motion to dismiss; and there were numerous motions to dismiss—lack of special matter, jurisdiction, and various data claimed upon which relief can be granted. Are you distinguishing motions for which relief can be granted?

THE COURT: I think I have stated what I have stated in my opinion.

And I reserve the right of reviewing this opinion so that it does state precisely what I intended it to state and modify it in the form I was thinking.

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN,
SOUTHERN DIVISION

NEWELL HAMMOND,

PLAINTIFF,

VS.

UNITED PAPERMAKERS AND PAPERWORKERS UNION, AFL-CIO AND UNITED PAPERMAKERS AND PAPERWORKERS LOCAL NO. 985 AND WATERVLIET PAPER COMPANY, DIVISION OF HAMMERMILL PAPER COMPANY,

DEFENDANTS.

Order Dismissing
File No. 246

At a session of said Court held on the 30th day of June, 1971, in the City of Kalamazoo, County of Kalamazoo, State of Michigan.

PRESENT: Honorable Noel P. Fox

This cause having been brought on to be heard upon the Motion to Dismiss complaint of the plaintiff and it appearing to this court that the pleadings of plaintiff, if taken as true, fail to state a cause of action upon which relief can be granted;

NOW, THEREFORE, IT IS ORDERED that the complaint of plaintiff may be and is hereby dismissed.

NOEL P. FOX

APPROVED AS TO FORM:

LEE BOOTHBY,
Attorney for Plaintiff

APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

NEWELL HAMMOND,

PLAINTIFF,

VS.

UNITED PAPERMAKERS AND PAPERWORKERS UNION, A.F.L.-C.I.O. AND UNITED PAPERMAKERS AND PAPERWORKERS LOCAL NO. 985 AND WATERVLIET PAPER COMPANY DIVISION OF HAMMERMILL PAPER COMPANY

Civil Action No. 246

COMPLAINT

THE PLAINTIFF SAYS:

1. This Court has jurisdiction over this action by virtue of the provisions of Title 28, United States Code, Sections 1331(a) and 1343, and Title 42, United States Code, Section 1988. The questions presented herein arise under the Constitution and laws of the United States, and the amount in controversy, exclusive of interest and costs, exceeds the sum of Ten Thousand ($10,000.00) Dollars.

2. Plaintiff is a resident of Watervliet, Berrien County, Michigan. Defendants United Papermakers and Paperworkers Union, A.F.L.-C.I.O. and its affiliated Local No. 985 (hereinafter referred to as the Union) are labor organizations having offices in Berrien County, Michigan. Defendant Watervliet Paper Company, a division of Hammermill Paper Company, is a foreign corporation having offices and doing business in Berrien County, Michigan.

3. On July 20, 1967, plaintiff was in the employment of the defendant paper company as a production employee at a

salary of approximately $8,000.00 per year. He had been an employee of said company for approximately 11 years.

4. On July 20, 1967, pursuant to the provisions of the National Labor Relations Act, as amended, and in particular of Section 8(a)(3) thereof, the defendant Watervliet Paper Company entered into a collective bargaining agreement with the defendant United Papermakers & Paperworkers, A.F.L.-C.I.O., and its affiliated Local No. 985. Pertinent portions of said agreement provide:

> "Section 3.2—Employees Included
> "The bargaining unit represented by the Union includes all production and maintenance employees in the Watervliet Paper Company, Division of Hammermill Paper Company, at its Watervliet, Michigan plant."

> "Section 3.4—Union Membership
> "It shall be a condition of employment that all employees of the employer covered by this Agreement who are members of the Union on the effective date of this Agreement or the date of the signing of this Agreement, whichever is later, shall remain members of this Union, and those who are not members on the effective date of this Agreement or the signing of this Agreement, whichever is later, shall on or after the Thirtieth (30th) day following the effective day of this Agreement or the date of signing of this Agreement, whichever is later, become and remain members in good standing in the Union. It shall also be a condition of employment that all employees hired after the signing of this Agreement, shall after forty-five (45) days following the beginning of such employment, or the expiration of their probationary period as provided in Article 12, Section 12.2 paragraph (a), become and remain members in good standing in the Union."

5. The Plaintiff was not a member of any Union at the time of the execution of the collective bargaining agreement

by the Defendants and thereafter failed and refused to become a member of the Defendant Union or pay membership fees and dues as a matter of conscience, religious training, belief, and as a member of the Seventh-day Adventist Church; and has at all times here pertinent entertained and practiced the sincere religious and conscientious conviction and belief that membership in and payment of fees and dues to a labor union violated his freedom of choice to deal justly and impartially with all men, for use of which freedom he is accountable to God.

6. Seventh-day Adventists believe in proper wages, proper hours, and proper working conditions. They also believe that they must not strive in their dealing with their fellowmen and that they must not be "unequally yoked" with those of different beliefs, objectives, and principles, that they must not discriminate between employer and employee, that they must witness to both, and to all classes of people, and to the degree to which a Seventh-day Adventist allies himself with one class against another, to that degree he violates his obligation to God to bear witness of the love of God and salvation of all men.

Seventh-day Adventists cherish as God's gift the principle of liberty of conscience as set forth in the Holy Scriptures and recognized and acknowledged as inalienable by the Government of the United States both in the Declaration of Independence and in its Constitution. It is on the basis of these principles that the Plaintiff cannot surrender his right to make decisions and financially support any organization which may act contrary to his conscientious religious convictions.

7. After the signing of the collective bargaining agreement, plaintiff signified to defendants his unwillingness to profit unjustly from any improvements in working conditions that might result from the collective bargaining agreement; he offered to, and did, make periodic contributions to the American Red Cross in amounts equal to the union dues that would have otherwise been payable by him as a union member.

8. On or about August 28, 1967, under the compulsion of

the collective bargaining agreement and the demands of the defendant unions, the employer company terminated plaintiff's employee-employer relationship by discharging him for the sole and stated reason that he had refused to join or pay dues to the local union as provided in Section 3.4 of the collective bargaining agreement.

9. Since his discharge on August 28, 1967, plaintiff has made extended and continued effort to obtain new employment at a salary comparable with that being paid him by the defendant paper company at the time of his discharge. The largest salary he has been able to obtain is approximately $6,000.00 per year.

10. Applied with the sanction of the National Labor Relations Act and therefore having the force of law, the collective bargaining agreement here in question, as applied to plaintiff, violates:

(a) Plaintiff's rights under the First Amendment by penalizing the free exercise of his religious belief and by conditioning his right to work upon surrender of his right to practice his religious beliefs.

(b) Plaintiff's rights not to be deprived of his contract or employer-employee relationship with his employer, arising under the Fifth Amendment.

(c) Plaintiff's rights under the Ninth Amendment to have his employer-employee relationship remain without interference under the collective bargaining agreement for union shop.

(d) Plaintiff's right under the Fourteenth Amendment.

11. As a direct result of the wrongful acts of defendants, plaintiff has already suffered loss of salary and benefits that exceeds $10,000.00, and unless defendants be enjoined from continuing to enforce the union shop provision of the collective bargaining agreement against him, plaintiff will continue to suffer further loss of salary and benefits each day the defendants

continue to enforce that provision by preventing his resumption of his former position with the defendant paper company.

12. Defendants' conduct threatens irreparable injury because the full amount of damage flowing from their wrongful conduct is difficult if not impossible of ascertainment.

13. Plaintiff has no adequate remedy at law.

WHEREFORE, Plaintiff demands:

(1) Judgment against the defendants, jointly and severally, for damages in the amount of $100,000.00.

(2) That the defendants and each of them be enjoined from doing any act to enforce against plaintiff the provisions of Section 3.4 of the collective bargaining agreement, and by mandatory injunction be required to reinstate plaintiff in his position with the defendant paper company at a salary not less than that being paid to him at the time of the discharge, and with all perquisites and privileges of his previous employment, including supplementary benefits, and those salary increases and benefits which, but for defendants' wrongful conduct, would have accrued to plaintiff in such employment.

(3) That an order be entered taxing defendants with the costs herein.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. 72-418

NEWELL HAMMOND,

Petitioner,

v.

UNITED PAPERMAKERS AND PAPERWORKERS UNION, A.F.L.-C.I.O., UNITED PAPERMAKERS AND PAPERWORKERS, LOCAL No. 985, and WATERVLIET PAPER COMPANY, DIVISION OF HAMMERMILL PAPER COMPANY,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENT WATERVLIET PAPER COMPANY IN OPPOSITION

The Respondent WATERVLIET PAPER COMPANY respectfully prays that the Petition for a Writ of Certiorari to review the Judgment and Opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on June 14, 1972 be denied.

OPINIONS BELOW

The Bench Opinion of the District Court granting Respondents' Motions to Dismiss is reproduced in Appendix C, p. 24, of the Petition for a Writ of Certiorari. The Opinion of the Court of Appeals affirming the Judgment of the District Court is reproduced in Appendix A, p. 20, of the Petition for a Writ of Certiorari.

JURISDICTION

Respondent does not question the jurisdiction of this Court as set forth in the Petition.

QUESTION PRESENTED

Petitioner's argument in the Reasons for Granting the Writ, pp. 7-18, asserts no rights involved other than the free exercise of religion. Petitioner's Complaint reproduced in Appendix E, pp. 28-32, of the Petition contains no allegation that the tenets of his church, rather than his personal convictions, forbid Petitioner from paying dues and fees to the Union. Therefore, the question presented is whether the Respondents violated the Petitioner's right to the free exercise of religion as provided under the First Amendment to the Constitution by discharging him pursuant to the union shop clause contained in the Collective Bargaining Agreement when the Petitioner's personal religious convictions precluded him from paying dues and fees to the Union.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Respondent has no objection to the constitutional provisions and statutes involved as set forth by the Petitioner.

STATEMENT OF THE CASE

Petitioner's Statement of the Case is a summary of the Petitioner's Complaint, Appendix E, pp. 28-32, which for purposes of this Petition must be taken as true. Petitioner's Statement of the Case is substantially correct in summarizing the allegations contained in the Complaint.

Petitioner asserts that he has a right to cause the Respondent Union, the Respondent Company and the United States to change the arrangements they have made to foster cooperation and efficiency in the national economy through use of the union shop. Petitioner claims it is against his religious convictions to pay union dues. These dues are his share of the cost the union incurs in representing him in collective bargaining. Petitioner does not claim his union dues are being used for any illegitimate purpose. He does not claim that he has been singled out from other workers and treated differently. But he does charge that the Respondent has a duty to treat him differently than all the other people it employs. Petitioner claims he should be allowed to work for the Company even though he ignores the Union Shop Agreement the Company has accepted.

REASONS FOR DENYING THE WRIT

I. This Case Raises No Important Question Of Constitutional Law Which Has Not Been Previously Decided By This Court.

There can be no doubt that freedom to hold religious beliefs and opinions under the First Amendment is absolute, *Torcaso v. Watkins,* 367 U.S. 488; *Fowler v. Rhode Island,* 345 U.S. 67; *West Virginia State Board of Education v. Barnette,* 319 U.S. 624; *Cantwell v. Connecticut,* 310 U.S. 296; *Reynolds v. United States,* 98 U.S. 145.

Nor can there be any doubt, except in Petitioner's mind, that freedom to act or not to act, even when such act or

omission is in accord with one's religious convictions, is not totally free from governmental restrictions, *Braunfeld v. Brown*, 366 U.S. 599; *Cleveland v. United States*, 329 U.S. 14; *Prince v. Massachusetts*, 321 U.S. 158; *Cantwell v. Connecticut*, 310 U.S. 296; *Jacobson v. Massachusetts*, 197 U.S. 11; and *Reynolds v. United States*, 98 U.S. 145.

These principles have also been expressed by the proposition that religious discrimination should not be equated with failure to accommodate, *Dewey v. Reynolds Metals Co.*, 429 F.2d 324, 335 (CA6 as affirmed without opinion by the United States Supreme Court, 402 U.S. 689); *Dawson v. Mizell*, 325 F. Supp. 511 (D.C., E.D. Va., 1971).

Petitioner's argument in the present case was anticipated and rejected nearly two centuries ago by the *First Constitutionalist*, Thomas Jefferson, when he wrote:

> "Believing with you that religion is a matter which lies solely between man and his God, that he owes account to none other for his faith or his worship, that *the legislative powers of government reach actions only, and not opinions*, I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should 'make no law respecting an establishment of religion, or prohibiting the free exercise thereof,' thus building a wall of separation between church and State. Adhering to this expression of the supreme will of the nation in behalf of the rights of conscience, I shall see with sincere satisfaction the progress of those sentiments which tend to restore to man all his natural rights, convinced *he has no natural right in opposition to his social duties.*" 8 *Works of Thomas Jefferson* at 113. (Emphasis added).

When the Congress, in the Railway Labor Act, Section 2, Eleventh, and in the National Labor Relations Act, Section 8(a)(3), authorized an employer and a union to agree, under certain conditions, to require union membership as a condition of employment, the payment of union

dues and initiation fees by an employee under such circumstances became a *social duty*.

This Court and other courts of the United States have, without exception, always treated the payment of such dues and initiation fees as a *social duty* which is not an unconstitutional infringement upon an employee's First Amendment rights.

The issue Petitioner presents was firmly decided by this Court in *Railway Employees' Dept. v. Hanson*, 351 U.S. 225. The *Hanson* case involved a suit by certain nonunion employees of a railroad to enjoin enforcement of a union shop agreement entered into between the railroad and labor organizations pursuant to the union shop provisions of the Railway Labor Act, the analogous provisions of Section 8(a)(3) of the National Labor Relations Act. The employees claimed that the agreement violated their First Amendment rights of freedom of association and their Fifth Amendment rights of due process. This Court unanimously held that:

> "... the requirement for financial support of the collective bargaining agency by all who receive the benefits of its work is within the power of Congress under the Commerce Clause and does not violate either the First or the Fifth Amendments.", 351 U.S. at 238.

In the case *sub judice* there is no allegation that more was required of Petitioner than payment of periodic dues, initiation fees and assessments or that the exaction of such payments was a cover for forcing ideological conformity. Petitioner acknowledges that he was discharged solely for failure to give financial support to the legitimate collective bargaining agency. *Hanson* should, therefore, be dispositive, but the Petitioner argues that this Court's holding does not embrace the case at bar.

This Court's admittedly limited holding in *Hanson* proved appropriate. Six years later in *International Ass'n of Machinists v. Street*, 367 U.S. 740, this Court confronted a situation where certain union employees, in a union shop au-

thorized by Section 2, Eleventh of the Railway Labor Act, sought to enjoin the enforcement of that union shop agreement on the grounds that it violated their First Amendment rights to the extent that the union used dues, initiation fees and assessments for purposes other than collective bargaining, more specifically, to finance the campaigns of candidates for Federal and State offices whom the employees opposed. This Court did not reach the constitutional issue, but held the Railway Labor Act by its terms denied the union such authority. However, this Court specifically reaffirmed its fundamental holding in *Hanson*.

When closely examined, *Hanson* and *Street* indicate that if only the statutory duties are required of an employee, such duties are not an unconstitutional infringement on First Amendment rights. Only the statutory duties have been required in the case at bar.

Other courts have heard Petitioner's arguments and then interpreted *Hanson* as holding what this Court explicity said it held. Thus, in *Linscott v. Miller Falls Co.*, 440 F.2d 14 (CA1) cert. den. 404 U.S. 872, a case identical to the one *sub judice* the United States Court of Appeals, First Circuit, per Chief Judge Aldrich stated there was *insufficient basis for distinguishing Railway Employees' Dep't v. Hanson.* In *Gray v. Gulf, Mobile and Ohio Railroad Company*, 429, F.2d 1064 (CA5) cert. den. U.S. 1001, another case virtually identical to the case *sub judice*, the United States Court of Appeals, Fifth Circuit, per Chief Judge Goldberg stated:

> "*In deciding the constitutional issue we are not required to navigate in unchartered waters.* Instead, *we are guided firmly to our destination by* two Supreme Court decisions, *Railway Employees' Department, AFL v. Hanson*, 1956, 351 U.S. 225; 76 S. Ct. 714, 100 L. Ed. 1112; and *International Association of Machinists v. Street*, 1961, 367 U.S. 740, 81 S. Ct. 1784; 6 L. Ed. 2d 1141. These decisions were relied upon by Judge Thomas in the court below; they have

been invoked by the parties on this appeal; and we agree that they are dispositive of the issue now before us.", 429 F.2d at 1068 (Emphasis added).

The Courts both granted motions to dismiss a Seventh Day Adventist's action against his employer and a union which claimed that his discharge because of his refusal to pay dues or fees to the union was in violation of his First Amendment free exercise rights.

Despite the clear language of *Hanson* and the clear language of *Gray* and *Linscott* Petitioner alleges error by the Sixth Circuit below because that Court relied on *Hanson*, and *Hanson* involved neither a particularized First Amendment claim nor did *Hanson* specifically invoke First Amendment tests of requiring a showing that the government interest was *paramount*, that any infringement of First Amendment rights was *necessary* or that on *balance* the government interest outweighed the injury. Yet all of these findings were implicit in *Hanson*. The Court in *Hanson* found the *paramount* government interest was industrial peace, any infringement was *necessary* in the sence that there was no more an infringement of First Amendment rights than there would be in the case of a lawyer who was required to be a member of an integrated bar and that on *balance* Congress had authority to adopt all appropriate measures to facilitate the amicable settlement of disputes.

In less than two years then, two cases identical to the case *sub judice* have been decided where two Circuit Courts upheld the *social duty* of payment of dues and initiation fees in the face of constitutional First Amendment free exercise challenges by following the principles announced by this Court in *Hanson*. In each instance, Certiorari has been denied by this Court. Now the United States District Court for the Western District of Michigan, Southern Division per Judge Fox, and the United States Court of Appeals, Sixth Circuit, have added their weight to this interpretation. Nothing has changed since this Court denied Certiorari on two identical cases. This Petition should therefore be denied.

II. The Opinion Of The Court Of Appeals In This Case Does Not Conflict With The Decision Of This Court In *Sherbert v. Verner*, 374 U.S. 398.

Petitioner seeks to escape the consequences of *Hanson, Street, Linscott,* and *Gray* by asserting at page 11 of the Petition that *the question presented in this case is when may conduct dictated by a religious conviction be regulated by the State or Congress. . .*! and by asserting *that this question was authoritatively determined by this Court in Sherbert v. Verner, not Hanson.* This is tantamount to arguing that the issue of whether the payment of union dues and initiation fees is a constitutional *social duty* in the face of a First Amendment challenge was not answered by this Court in *Hanson* but that the question was determined by this Court in *Sherbert v. Verner*, 374 U.S. 398. This latter proposition is patently erroneous.

The only similarity between *Sherbert* and the case *sub judice* is that in *Sherbert* the plaintiff was also a Seventh Day Adventist. The union shop was not involved in *Sherbert*. Nor was the payment of union dues or initiation fees. In *Sherbert* the question was whether or not the denial by South Carolina of unemployment compensation benefits to a Seventh Day Adventist for the reason she refused to work on Saturday, her Sabbath, was an unconstitutional restriction of the free exercise of her religion. This Court, after setting forth various factors to be balanced, determined that such a restriction was in fact unconstitutional.

As Petitioner acknowledges at page 12 of his Petition, *Sherbert* requires a threshold finding before its balancing of interests test applies. The Court must first determine whether there has been an:

> "Infringement by the State of. . . constitutional rights of free exercise [of religion under the First Amendment] . . .", *Sherbert v. Verner*, 374 U.S. at 403.

This is the factor which distinguishes *Sherbert* from the case *sub judice*. The State of South Carolina had an express policy of discrimination based on religion. A statute provided that a person could not be made to work on Sunday if he objected as a matter of conscience. No such allowance was made for Saturday. Mr. Justice Brennan, speaking for this Court in *Sherbert* found that factor to be crucial.

> "*Significantly* South Carolina expressly saves the Sunday worshipper from having to make the kind of choice which we hold here infringes the Sabbatarian's *religious liberty.*" *Sherbert v. Verner*, 374 U.S. 398 at 406 (Emphasis added).

This Court recognized the limitations of the holding in *Sherbert* when it said:

> ". . . the state interest asserted in the present case is wholly dissimilar to the interests which were found to justify the less direct burden upon religious practice in *Braunfeld v. Brown, supra.* The Court recognized that the Sunday closing law which that decision sustained served 'to make the practice of the [Orthodox Jewish Merchants] religious beliefs more expensive, '366 U.S. at 605. But the statute was nevertheless saved by a countervailing factor which finds no equivalent in the instant case — a strong state interest in providing one uniform day of rest for all workers." 374 U.S. at 408.

State or Federal discrimination is lacking in the case *sub judice* and this Court should, therefore, deny the Petition.

Sherbert has been found inapplicable in similar cases. Thus, where a Seventh Day Adventist was fired from his job because his religion forbade working on Saturday although his employer and union required it, the District Court for the Eastern District of Virginia, Richmond Division held that the firing did not constitute an infringement of plaintiff's right to free exercise of religion under *Sher-*

bert. Therefore, the *Sherbert* balancing of interests test did not apply. The Court held:

> "The Court finds *no infringement of plaintiff's rights* concerning his religious beliefs. Religious discrimination should not be equated with failure to accommodate . . . .
>
> "Plaintiff contends that the Court is bound by the rule laid out in *Sherbert v. Verner*. . . .
>
> "It should be noted in the *Sherbert* case it was pointed out that the law of South Carolina expressly saved the Sunday worshipper from having to make the kind of choice which was imposed upon the appellant in that case. Not so in our instant case. There is no evidence of any blanket permission to those who believe Sunday to be the Sabbath to be relieved from work. . . . *The Court does not find Sherbert v. Verner, supra, apropos in the instant case.*", *Dawson v. Mizell*, 325 F. Supp. at 514-515 (Emphasis added).

Although in *Gray* the Fifth Circuit had *Sherbert* before it, it did not invoke it as requiring balancing, nor did the First Circuit in *Linscott* believe it was necessary.

In the case *sub judice* there is no evidence of any discrimination or different treatment of Petitioner from others. The contract makes no reference to religion. No covert intention to aid or hinder religious belief has been alleged. All employees of the Respondent Company were required to join the Respondent Union and pay initiation fees and dues within 30 days after the date of the contract or the date of employment. The contract merely requires the employer to dismiss an employee if he does not pay union fees and dues. This Court should hold that Petitioner's right to free exercise of religion has not been infringed. Therefore, the balancing of interests set forth in *Sherbert* is not applicable. This Court should, therefore, deny the Petition.

III. Assuming Arguendo *Sherbert* Balancing Applies Such Application Requires Denial Of The Petition.

Balancing was not born with *Sherbert*. In balancing compulsory vaccination requirements against a claim they offended religious conscience this Court upheld the *social duty* of vaccination, *Jacobson v. Massachusetts*, 197 U.S. 11. In balancing Sunday closing laws against a claim by Sabbatarians that it infringed their free exercise of religion, this Court upheld the public interest in one day of peace and tranquility, *Braunfeld v. Brown*, 366 U.S. 599. In balancing anti-polygamy laws against a claim that polygamy was commanded by God this Court upheld the public interest against polygamy, *Reynolds v. United States*, 98 U.S. 145. In balancing the public interest in the Federal minimum wage law against a free exercise objection the public interest has been upheld, *Mitchell v. Pilgrim Holiness Church Corp.*, 210 F.2d 879 (CA7) cert. den., 247 U.S. 1013. In balancing the public interest in taxes against a free exercise objection the public interest in taxes has been upheld, *Parker v. Commissioner*, 365 F.2d 792 (CA8) cert. den. 385 U.S. 1026.

In affirming a decision refusing to enjoin an employer from discharging an employee because of his refusal to join a union, where there was a union shop agreement, due to the employee's religious scruples which forbade his becoming a member of organizations composed in any part of "unbelievers" the United States Court of Appeals, Second Circuit, per Judge L. Hand said:

> "The First Amendment protects one against action by the government, though even then, not in all circumstances; but it gives no one the right to insist that in the pursuit of their own interests others must conform their conduct to his own religious necessities. A man might find it incompatible with his conscience to live in a city in which open saloons were licensed; yet he would have no constitutional right to insist that the saloons must be closed. He would have to

leave the city or put up with the *iniquitous dens* no matter what economic loss his change of domicil entailed. We must accommodate our idiosyncrasies, religious as well as secular, to the compromises necessary in communal life; and we can hope for no reward for the sacrifices this may require beyond our satisfaction from within, or our expectations of a better world.", *Otten v. Baltimore & O.R. Co.*, 205 F.2d 58 (CA2) at p. 61, final judgment affirmed sub nom.; *Otten v. Staten Island Rapid Transit Railway Co.*, 229 F.2d 917 (CA2) cert. den. 351 U.S. 983.

The United States Court of Appeals, Ninth Circuit followed *Otten* in disposing of a similar claim, *Wicks v. Southern Pacific Co.*, 231 F.2d 130 (CA9) cert. den. 351 U.S. 946.

The most appropriate balancing this Court has done with respect to the case *sub judice* occurred in *Hanson*. Only after such balancing did this Court hold that a union shop agreement does not violate the First Amendment.

After announcing that *Hanson* controlled, the United States Court of Appeals, Fifth Circuit, in *Gray*, a case identical to the one *sub judice* summarized the balancing of interests which was implicit in the decision as follows:

> "Nor do we consider this a harsh or unjust result. As Judge Thomas observed below, '[p]laintiff's religious scruples are not the first which [have] had to yield to the general applicability of a statute.', 302 F. Supp. at 296. The First Amendment commands us to be vigilant in protecting the free exercise of religion, but religious conscience cannot be a superordinating factor in every situation. *The hand of government is not to be stayed where a compelling governmental interest outweighs the infringement upon First Amendment rights.*", 429 F.2d at 1072 (Emphasis added).

The United States Court of Appeals for the First Circuit recognized the balancing done by this Court in *Hanson*

and applied it in *Linscott*, a case also identical to the one *sub judice* when it said:

> "A strong governmental interest in the union shop was found in *Hanson*. *Sherbert v. Verner* . . . in fact adopted its 'compelling state interest' test from freedom of association cases, see *Sherbert v. Verner*, 374 U.S. at 403 . . ., citing *N.A.A.C.P. v. Button*, 1963, 371 U.S. 415 . . . so that *Hanson's* balancing, and thus its conclusion, should be the same in the case before us, since the government's interest, and the plaintiff's burden (loss of a union-shop employer) are apparently the same.", 440 F.2d at 17.

Nonetheless, to accommodate the Plaintiff's argument that, "*Hanson* faced only with the more general freedom of association issue, is to be read as reserving our present question", the First Circuit in *Linscott* proceeded with the balancing of interests as follows:

> "The state interest in *Sherbert* in compensating or not compensating single individuals, seems less substantial than the federal interest in *Hanson* in preserving the principle and broad purposes of the union shop.
>
> "With respect to *Sherbert*, while the government always has an interest in saving money, its primary concern in connection with unemployment compensation is protection of the disadvantaged person. To deny him physical sustenance because, he will not affront his religious convictions would scarcely be considered social legislation . . . . In the present case the *interests are not merely that of the plaintiff versus the cost to the fisc;* opposed to the plaintiff's interest are both the public and private interests in collective bargaining and industrial peace.", 440 F.2d at 18 (Emphasis added).

Balancing has not been absent in the present case. Judge Fox in his Bench Opinion indicated a balancing process when he said:

> "The tax is to be paid to the agent for the agent's benefit and to no one else. One cannot avoid income tax, state, local or national by agreeing to pay the same to a charitable organization of either the government's choice or of its own choice. Taxes do not work that way. These are not the ways of Caesar. Taxes are supposed to apply to all who share the benefits of the government agency that the taxes support.
>
> "The same principle has been approved as a means of support for certified bargaining agents in the collective bargaining scheme of management labor relations which is developing its own type of common law as well." (Appendix C, p. 25).

Judge Fox was not the first to liken the payment of union dues to the payment of taxes. In a similar case Chief Judge Wyzanski, U.S. District Court, District of Massachusetts said:

> "Moreover, this action is not a violation of the First Amendment because it is the equivalent of the exaction of a non-discriminatory tax levied pursuant to a power conferred by the Constitution and laws and used for a purpose authorized by the Constitution.", *Linscott v. Miller Falls Company*, 316 F. Supp. 1369, at 1371.

On appeal the First Circuit adopted this rationale and the Fifth Circuit in *Gray* also analogized the payment of union dues to the payment of taxes.

Both Judge Fox and the Sixth Circuit Court in affirming the motion to dismiss relied on *Hanson, Gray* and *Linscott*, all cases where a balancing of interest occurred. The proof to be balanced was Petitioner's Complaint which was treated as true. This Court may take judicial notice of the public interest in the union shop.[1]

Assuming arguendo that the Union Shop Agreement between Respondent Union and Respondent Company in-

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[1] 9 Wigmore, *Evidence*, §2571 (3rd ed. 1940)

fringes on Petitioner's right to free exercise of religion, the following test may be applied:

> ". . . any incidental burden on the free exercise of appellant's religion may be justified by a 'compelling state interest in the regulation of a subject within the State's constitutional power to regulate . . .' ", *Sherbert v. Verner*, 374 U.S. 398, 403 citing *N.A.A.C.P. v. Button*, 371 U.S. 415.

According to the *Sherbert* test the Petition should be denied. The compelling public interest in a union shop, expressed in *Hanson*, *Gray*, and *Linscott* outweighs any incidental and indirect infringement of Petitioner's right to free exercise of religion.

The compelling public interest in the union shop has too often been stated by this Court and the Congress to be questioned now. As a very minimum it was thought that this arrangement would promote industrial peace and security. The Legislative History of Section 8(a) (3) of the National Labor Relation Act indicates that the union shop agreement was a compromise between backers of the more inclusive closed shop and those who wanted no compulsory unionism at all. It was the sole method by which the government could attain its goal.[2]

The government interest in the union shop is far more substantial than: the government's interest in serving District of Columbia Jail inmates pork when weighed against a free exercise objection, *Barnett v. Rodgers*, 410 F.2d 995 at 1000 (D.C. Cir.); the government interest in preventing an embarrassing antiwar display at the District of Columbia Ellipse when weighed against a First Amendment objection, *Women Strike For Peace v. Hickel*, 420 F.2d 599 at 605 (D.C. Cir.); the government interest in obtaining competent jurors when weighed against a free exercise objection, *In re Jenison*, 375 U.S. 14, the government inter-

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[2]H.R. Rep. No. 245, 80th Cong., 1st Sess.; S. Rep. No. 105, 80th Cong., 1st Sess.; "Legislative History of the Labor-Management Act, 1947."

est in proscribing the use of pejote, a halluciogenic when weighed against a religious belief by an Indian tribe that it was a sacramental symbol similar to bread and wine used in Christian churches, *People v. Woody*, 61 Cal. 2d 716, 719, 40 Cal. Rptr. 69 (1964); or the government interest in two additional years of compulsory education when weighed against a free exercise objection, *Wisconsin v. Yoder*, ... U.S. .....; all cases upon which Petitioner relies. Rather, the compelling and substantial government interest in the union shop is similar to the government interest in military conscription when weighed against religious objections to a particular war, *Gillette v. U.S.*, 401 U.S. 437 at 461, 462.

The union shop in the present case was created only through an agreement between Respondent Company and Respondent Union pursuant to the authority of the National Labor Relations Act. In agreeing to a union shop it must be assumed that Respondent Company expected something in consideration. That consideration included industrial peace and security. Respondent Company has a great interest and investment in such peace and security. Now Petitioner has claimed that the Company unlawfully discharged him. Yet if the Company declined to discharge the Petitioner the Respondent Union could institute a federally supported suit, if not an unfair labor practice charge, for failure to live up to its bargaining agreement, *Linscott v. Miller Falls Co.*, 440 F.2d 14 (CA1), cert. den. 404 U.S. 872. That hardly promotes industrial peace, security, or stability. As this Court noted over a decade ago:

> "We are a cosmopolitan nation made up of people of almost every conceivable religious preference. These denominations number almost three hundred. Consequently, it cannot be expected, much less required, that legislators enact no law regulating conduct that may in some way result in an economic disadvantage to some religious sects and not to others because of the special practices of the various religions.", *Braunfeld v. Brown*, 366 U.S. at p. 606.

The uncertainty and disruption which would result if an employer were required at his peril to run the risk of violating either the Constitution or his collective bargaining agreement, every time a member of one of these three hundred denominations asserted the payment of union dues and initiation fees violated his free exercise rights demands that this Petition be denied.

It has been held that an employer who is a Seventh Day Adventist may not refuse to bargain collectively with a union notwithstanding the employer's religious belief that forbade him from dealing with a labor union because the collective bargaining requirements under the National Labor Relations Act are sufficiently invested with public interest to justify the good faith bargaining requirement to employers, notwithstanding their religious beliefs, *Cap-Santa Vue v. N.L.R.B.*, 424 F.2d 833 (D.C. Cir.). The same result should follow for an employee.

The Petition should therefore be denied.

CONCLUSION

The *Hanson* case clearly held that under a union shop agreement the requirement that *all* members must pay dues and initiation fees is not an unconstitutional infringement of First Amendment rights. This holding was reaffirmed by the Fifth Circuit in *Gray* and the First Circuit in *Linscott*. Despite this precedent Petitioner now seeks a Writ of Certiorari to the Sixth Circuit for following the instructions of this Court. The Petition should be denied.

Respectfully Submitted

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DATED: October 4, 1972

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-418

NEWELL HAMMOND, *Petitioner,*

v.

UNITED PAPERMAKERS AND PAPERWORKERS, AFL-CIO, UNITED PAPERMAKERS AND PAPERWORKERS, LOCAL NO. 985 and WATERVLIET PAPER COMPANY, DIVISION OF HAMMERMILL PAPER COMPANY,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF FOR RESPONDENT UNITED PAPERMAKERS AND PAPERWORKERS, AFL-CIO, UNITED PAPERMAKERS AND PAPERWORKERS, LOCAL NO. 985 IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A., 20-22) is reported at 462 F.2d 174 (C.A. 6). The opinion and order of the District Court for the Western District of Michigan is reproduced in Appendix C, pp. 24-27 of the petition.

JURISDICTION

The judgment of the court of appeals (Pet. App. B, 23) was entered on June 14, 1972. The petition for a writ of certiorari was filed on September 12, 1972. The jurisdiction of this Court is invoked under 28 U.S. 1254 (1).

QUESTIONS PRESENTED

1. Whether the union security provisions set forth in Section 8(a)(3) of the National Labor Relations Act are unconstitutional because their dues payment requirement does not permit full sway for the exercise of plaintiff's religious principles in his role as an industrial employee, and therefore contravene the First Amendment.

2. Whether the the court below correctly affirmed the District Court order dismissing petitioner's complaint for failure to state a cause of action upon which relief could be granted when the undisputed record shows:

(a) That the collective bargaining agreement between the respondent Union and the Company incorporated a union security clause specifying a "union shop";

(b) that the petitioner, an employee and an adherent of the Seventh Day Adventist Church, refused at the expiration of thirty days from the execution of the collective bargaining contract, and at all times thereafter, to pay dues to the Union—the sole requirement imposed upon him; and

(c) that as a consequence of petitioner's refusal to pay union dues, assertedly because of religious proscriptions, he was discharged by the Company pursu-

ant to the collective bargaining contract and Section 8(a)(3) of the National Labor Relations Act.

STATUTES INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*) are set forth at pages 3-4 of the petition, and the text of the First Amendment to the Constitution appears at page 2 of the petition.

STATEMENT

A. The Undisputed Facts

At all times material herein, the respondent Union (United Papermakers and Paperworkers, AFL-CIO and its affiliated Local No. 985) represented a majority of the production and maintenance employees, who comprised an appropriate unit for collective bargaining, at the Watervliet, Michigan plant of the respondent Watervliet Paper Company (A. 3).[1] On behalf of these employees, the Union, on July 20, 1967, entered into a collective bargaining agreement with the Company, which incorporated standard union security provisions (Sections 3.2 and 3.4; Pet. App. E, 29), as sanctioned by the proviso to Section 8(a)(3) of the National Labor Relations Act (hereinafter the "Act"). The so-called "union shop" so established, required any production or maintenance employee not already a member of the Union to "become and remain" a member "in good standing", after thirty days from the effective date of the collective bargaining contract.

After the expiration of the thirty-day grace period, petitioner Hammond—a production employee of many

[1] "A." refers to the portions of the record filed as an Appendix with the court below.

years standing but not yet a member of the Union—notified the Union and the Company of "his unwillingness to profit unjustly from any improvements in working conditions that might result from the collective bargaining agreement (Pet. App. E, 30). Accordingly, Hammond "refused to become a member of the Union or pay membership fees and dues", assigning as the ground his "religious training" and "belief . . . as a member of the Seventh Day Adventist Church". While conceding that adherents of the Seventh Day Adventist Church "believe in proper wages, proper hours, and proper working conditions", Hammond nevertheless insisted, in this connection, that they "must not strive in their dealing with their fellowmen," nor be "unequally yoked with those of different beliefs, objectives, and principles", nor even "discriminate between employer and employee" (*Ibid.*).

Hammond refused payment of dues to the Union, the sole requirement made of him for union standing, in the further "belief that membership in and payment of fees and dues to a labor union violated his freedom of choice to deal justly and impartially with all men" (Pet, App. E, 30), he offered instead to make periodic contributions to the American Red Cross in equivalent amounts (A. 5). Hammond was discharged by the Company on August 28, 1967, pursuant to the union security clause of the collective bargaining contract "for the sole and stated reason that he had refused to join or pay dues to the local union as provided in Section 3.4" (Pet. App. E, 31).

B. The Proceedings and Decisions Below

On June 19, 1970, almost three years later, Hammond filed suit in the District Court, seeking money damages in the amount of $100,000, as well as in-

junctive relief, including fully equivalent reinstatement to his position with the Company (A. 6-7). Petitioner's action was brought on the theory that the collective bargaining agreement, "applied with the sanction of the National Labor Relations Act", violated his constitutional rights (A. 5-6).

Both the Union and the Company filed motions to dismiss the complaint on the ground, among others, that it failed to state a cause of action upon which relief could be granted. On June 30, 1971, the District Court Judge dismissed the action on this basis (Pet. App. C., 25) pointing out that the issues raised had been "fairly litigated" in other jurisdictions as exemplified by the principal decisions upon which he sought relief (A. 15), namely: *Linscott* v. *Millers Falls Co.*, 440 F.2d 14 (C.A. 1, March 29, 1971), *cert. den.*, October 12, 1971, 404 U.S. 872; *Gray* v. *Gulf, Mobile & Ohio R.R. Co.*, 429 F.2d 1064 (C.A. 5, 1970), *cert. den.*, 400 U.S. 1001 (1970); and *Dewey* v. *Reynolds Metal Co.*, 429 F.2d 324 (C.A. 6, June 4, 1970, rehearing August 13, 1970) as affirmed without opinion by this Court, 402 U.S. 689.[2]

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[2] The District Court Judge, while treating "all of the positions of the plaintiff factually . . . as true and proved" and recognizing Hammond's "sincere religious convictions", balanced "that interest with the Congressionally approved and new court approved provision of the Taft-Hartley Law which does not require the union shop . . . but permits it", unless the particular state has legislated against it (A.13).

He further observed that the "ultimate objective of a congressionally sanctioned union security" provision was to distribute the representation costs "among all of those who were participants in its benefits", thus furthering the interests of interstate commerce, noting in this regard: "One cannot avoid income tax, state, local or national by agreeing to pay the same to a charitable organization of either the government's choice or of its own choice. Taxes do not work that way." (Pet. App. C., 24-25).

The court of appeals, in a *per curiam* decision, affirmed the findings, conclusions, and judgment of the District Court, emphasizing that the specific issue on appeal has been decided adversely to petitioner by the United States Court of Appeals for the First Circuit in *Linscott* v. *Millers Falls Co.*, 440 F.2d 14 (1st Cir.), *cert. den.*, 404 U.S. 872 (1971), and by the United States Court of Appeals for the Fifth Circuit in *Gray* v. *Gulf, Mobile & Ohio R.R. Co.*, 429 F.2d 1064 (5th Cir., 1970), *cert. den.*, 400 U.S. 1001 (1971).

ARGUMENT

Petitioner's contention—that the decision below raises an important question of constitutional law not previously resolved by this Court—is anachronistic at this late date. No new element or argument has been urged by petitioner, either upon this Court or the courts below, that has not received thoroughgoing judicial consideration at the highest levels and been found wanting. Petitioner's plea is in the teeth of both reason and unanimous authority.

The United States circuit courts of appeals, when confronted with the issue at hand, have taken as their touchtone the maxim that "our case law has long drawn a distinction between the absolute freedom to *hold* religious beliefs and the freedom of conduct based upon religious beliefs" together with its corollary that the "latter freedom may be curtailed in some circumstances for the protection of society" *Cap Sante Vue, Inc.* v. *NLRB*, 424 F.2d 883 (C.A. D.C., 1970). The authoritative guidelines were set forth by this Court in such cases as *Cantwell* v. *Connecticut*, 310 U.S. 296, 303-304 (1940):

> "The constitutional inhibition of legislation on the subject of religion has a double effect. On the one hand, it forestalls compulsion by law of the

> acceptance of any creed or the practice of any form of worship . . . On the other hand, it safeguards the free exercise of the chosen form of religion. *Thus the* [*First*] *Amendment embraces two concepts—freedom to believe and freedom to act. The first is absolute but in the nature of things; the second cannot be. Conduct remains subject to regulation for the protection of society.*" [Italics supplied]

Under this doctrine, reiterated some twenty years later in *Braunfeld* v. *Brown*, 366 U.S. 599, 603-604 (1961), while "[t]he freedom to hold religious beliefs and opinions is absolute", nevertheless "the freedom to act, even when the action is in accord with one's religious convictions, is not totally free from legislative restrictions"; hence "legislative power . . . may reach people's actions when they are found to be in violation of important social duties or subversive of good order, even when the actions are demanded by one's religion." This principle has been applied in a variety of contexts in which the courts have held that religious practices assertedly protected by the First Amendment must yield to legitimate and compelling governmental interests.[8]

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[8] The illustrative cases abound, as recently pointed out by the United States Court of Appeals for the District of Columbia Circuit (*Cap Sante Vue, Inc.* v. *NLRB*, *supra*, 424 F.2d at 886-887):

> "For example, a state's child labor law may take precedence over the right of a child to exercise his religion by selling religious literature. *Prince* v. *Massachusetts*, 321 U.S. 158 (1944). The refusal to comply with the federal minimum wage law may not be justified on religious grounds. *Mitchell* v. *Pilgrim Holiness Church Corp.*, 210 F.2d 879, 12 WH Cases 15 (7th Cir.) cert. denied, 347 U.S. 1013, 12 WH Cases 188 (1954), nor may the refusal to pay federal income taxes, *Parker* v. *Commissioner*, 365 F.2d 792 (8th Cir. 1966), cert. denied, 385 U.S. 1026 (1967). The use of marijuana and other drugs may be prohibited, even when used as part of a religious ceremony. *United States* v. *Kuch*, 288 F. Supp. 439 (D.D.C. 1968)."

Wisconsin v. *Yoder*,[4] contrary to petitioner's contention (petition, pp. 14-17), presents no hint of conflict with the decision below, and is, moreover, entirely harmonious with the doctrine of *Braunfeld* v. *Brown, supra*, which it reaffirms (32 L.Ed. at 33). The Court's decision—holding that an accommodation under the free exercise clause permitting Amish children age 14 and 15 to forego one or two additional years of compulsory education—was not "intended to undermine the State's compulsory school attendance statutes or to limit the powers of the State to promote reasonable standards" providing for continuing vocational education in this age bracket (32 L.Ed. 2d at 37). It may be seen at a glance that the rationale of *Linscott* v. *Millers Falls Company, supra*, adopted by the court below is altogether consistent with that of *Wisconsin* v. *Yoder*, which, it may be added preliminarily, is on a qualitatively different factual footing.

The Decision of the First Circuit in Linscott v. Millers Falls Company, 440 F.2d 14, cert. den. 404 U.S. 872

In *Linscott*, the leading case relied upon by the court below, the decision was handed down on March 29, 1971 and certiorari denied by this Court on October 21, 1971. The court of appeals there dealt with a plea precisely on all fours with that of petitioner here[5] and held that a

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[4] U.S. , 32 L.Ed. 2d 15, 92 S. Ct. , decided May 15, 1972.

[5] As the court stated (440 F.2d at 15):

"Admittedly, under the collective bargaining agreement, plaintiff's sole obligation to the union was the payment of dues and fees. She had offered to pay the equivalent to a non-religious charity, but the union declined the proposal. The company then discharged her. The present suit is for damages

union does not violate the constitutional rights of an employee when it negotiates a contract with an employer containing a union-shop clause, after which it requests the employer to discharge the employee for failure to pay union dues; that the purpose of the union-security clause is to supply funds to the union to compensate for the performance of its function as a federally empowered agent of the employees; that there is thus imposed, in effect, a uniform tax on all employees as a "fair sharing of the cost of collective bargaining" to pay for a service that—in the judgment of Congress—will promote the uninterrupted flow of interstate commerce; and that impingement upon First Amendment rights has been found permissible by this Court in such circumstances, where a compelling government interest is at stake.

In a carefully reasoned exposition, the court proceeded to surmount the constitutional hurdles sought to be raised by counsel in *Linscott*, as in the case at bar. In resolving the "more difficult question" posed by the First Amendment—"whether the governmental interest expressed in the labor legislation can justify . . . interference" with the employees' "competing interest in choosing the employment she wishes without cost to her religious convictions," the court first adverted to the maxim that "[f]reedom of religion is not absolute." In turning to a "balancing" of the interests to determine whether "the governmental interest may be paramount if it is 'compelling' "—the test spelled out by the Supreme Court in *Sherbert* v. *Verner*, 374

as well as injunctive and declaratory relief, based essentially upon the claim that plaintiff's discharge deprived her of the right of free exercise of religion under the First Amendment. The district court granted the defendants' motions to dismiss, 316 F.Supp. 1369 . . . and plaintiff appeals."

U.S. 398, 403—the court further recognized that the "elements of such a balancing test include, in addition to the importance of the governmental and religious interests, the degree of interference with the religious practice" (440 F.2d at 17).[6]

In this connection, the *Linscott* court relied upon the authority of *Railway Employees Dep't* v. *Hanson*, 351 U.S. 225 (1956)—in which a constitutional challenge on First and Fifth Amendment grounds was directed to the analogous union-shop provisions of the Railway Labor Act, as amended—and this Court's holding that " '[i]ndustrial peace along the arteries of commerce [as] a legitimate objective, 351 U.S. at 323' " for justifying the legislation in question and, equally significant, the recognition accorded by this Court to the "validity and importance of the congressional purpose to achieve uniform union membership, both to further peaceful labor relations and, as desirable for its own sake. to require a fair sharing of the costs of collective bargaining' " (*Id.*). Further pursuing the "balancing" doctrine as defined in *Sherbert* v. *Verner, supra,* the *Linscott* court declared that the "state interest in *Sherbert* (in compensating or not compensating single individuals" [with unemployment compensation], and thus merely furthering a routine "interest in saving money") was "less substantial than the federal interest in *Hanson* in preserving the principle and broad purposes of the union shop," and concluded that prime factors outweighing the interest of the recalcitrant employee, "are both the public and

[6] Cf., Clark, "Guidelines for the Free Exercise Clause", 83 Harv. L. Rev., 327 (1969); Giannella, "Religious Liberty, Nonestablishment, and Doctrinal Development", 80 Harv. L. Rev., 1381, 1390 (1967).

private interest in collective bargaining peace," thereby satisfying the *Sherbert* criterion of a "compelling" governmental interest (440 F.2d at 18).

Gray v. Gulf, Mobile & Ohio R.R. Co., 429 F.2d 1084 (C.A. 5, 1970), cert. den. 400 U.S. 1001 (1971).

This case, upon which the court below also placed reliance, likewise parallels the instant case, except that it involved a constitutional challenge, on religious grounds, of the union-shop as a federally authorized instrumentality for collective bargaining, this time between railway employees and management under the Railway Labor Act, as amended.

Again, the factual pattern presented was identical with that here presented. It was held that, in the light of this Court's teachings ("the First Amendment's protection of religious conscience is not absolute when a religious opinion is translated into an act or a refusal to act"), it is "simply not possible in an ordered society to allow every aspect of religious belief to stay the hand of government under the aegis of the First Amendment." (429 F.2d at 1072). Indeed, this Court's decisions in *Railway Employees Dep't* v. *Hanson, supra,* and *International Association of Machinists* v. *Street,* 367 U.S. 740 (1961), were viewed as fully "dispositive of the issue." (429 F.2d at 1068).[7]

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[7] In both *Hanson* and *Street,* this Court was confronted with attacks on the constitutionality of the provisions of the Railway Labor Act permitting union-shop agreements (Section 2, Eleventh, 45 U.S.C.A. § 152). However, in *Street,* the railroad employees challenging the statute, complained that "portions of the union dues which they paid were used for political purposes antithetical to their beliefs rather than for collective bargaining purposes". This Court interdicted only "the *expenditure* of unions funds for *non-collective bargaining purposes*" but at the same time the Court "specifically reaffirmed the constitutional validity of compulsory

Concluding Considerations

As this Court pointed out in *Street,* the argument that proved "decisive with Congress" was the key role of the unions in the regulatory framework designed to eliminate strike and disruption in the vital field of rail transportation. Since it was "the duty of the union acting as exclusive bargaining representative to represent equally . . . the entire membership of the craft or class, including non-union members, fairly, equitably and in good faith," it followed that the cost of performing the duties involved in negotiating and administering collective agreements must be spread among all the employees who benefited.[8] Identical considerations obtain for the labor-management bargaining machinery created by the Act here. Accordingly, the courts of appeals have considered and rejected, point-by-point, the main contentions petitioner again advances in this forum in seeking to challenge the decision below.[9]

With respect to the union security arrangements sanctioned by the Act, on a limited basis and under ap-

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exaction of union dues under union shop agreements" [367 U.S. at 771] and "left unimpaired the imprimature of constitutionality" which *Hanson* had placed on the statutory provisions in question. (427 F.2d at 1070, 1071). In the instant case, petitioner makes no claim "that any portion of the financial contributions demanded by the union would have been used for non-collective bargaining purposes", contending only that payment of union dues would be anathema because of his religious principles.

[8] The pertinent legislative history is traced by the Court in *Street* (367 U.S. 755, 760-761).

[9] The courts have not looked with any greater favor on a plea emanating from the employer side for special exemption from the Act, or an attack on the constitutionality of its collective bargaining imperatives, based upon the same religious convictions. *Cap Sante Vue, Inc.* v. *NLRB, supra.*

propriate safeguards, petitioner would have this Court outlaw a technique that was specifically authorized by the Congress more than a quarter of a century ago, after careful deliberation, and has become a common feature of labor-management relations in the main industrial sectors of our economy, including the railroad transportation industry.

This Court and the other appellate tribunals have studiously refrained from substituting the judgment of the judiciary for the judgment of the legislature. In the lengthy history of industrial relations in this country, no one has to date been able to devise a satisfactory substitute for the process of collective bargaining as the primary means of resolving labor disputes and averting strife in the industrial complex. Challenges, such as that interposed here, have been uniformly turned back. Nor, as was stated in the *Gray* case, *supra,* is this a "harsh or unjust result" under the circumstances there and here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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